IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 113 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RATILAL JADABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 113 of 1991

MR HM PARIKH for Petitioners No. 1-2

MR MA BUKHARI, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 28/12/2001

ORAL JUDGEMENT

#. The appellants abovenamed have preferred this appeal under section 374 of the Code of Criminal Procedure, 1973 challenging the judgment and conviction order recorded by

the learned Additional Sessions Judge, Kheda at Nadiad on 31.1.1991 in Sessions Case No.81 of 1986 under which the learned Additional Sessions Judge convicted the two appellants for the offence punishable under section 304 Part-II of IPC and sentenced each of them to suffer RI for three years and they were directed to pay a fine of Rs.250/-. In default of payment of fine, they were further directed to suffer RI for three months.

#. The appellants faced the charge for the offence punishable under section 302 of IPC. The charge was framed against the appellants at Exh.3. It was alleged against the appellants that on 15.9.1985 at about 12.30 noon, the appellants committed the murder of one Fatabhai - father of the informant - Rajubhai Fatabhai by inflicting dhariya and iron pipe blows and thereby committed the offence punishable under section 302 of IPC.

#. The case of the prosecution before the trial court was that, on the date of the incident i.e. on 15.9.1985, the original informant Rajubhai Fatabhai was relaxing at his residence. At that time, a boy named Vinubhai came there running and shouted at the informant as well as his sister that his father was being beaten by the present appellants near the bus stand. Therefore, the informant along with his sister and brother ran towards the bus stand. The witnesses saw their father being beaten by the appellants. In fact, the second appellant Laxmanbhai was seen dealing an iron pipe blow on the head of Fatabhai and the first appellant dealt the dhariya blow on the head of Fatabhai. Another dhariya blow was also dealt on the person of Fatabhai. Thereafter, the appellant Laxmanbhai dealt one more pipe blow on the knee of Fatabhai. At that time, Fatabhai had fallen down on the floor in injured condition. His injuries were bleeding, and therefore, the informant took him to Mahemdavad Government Hospital in Rickshaw and thereafter, the father was taken to Ahmedabad and there he died on account of the injuries sustained by him. It is, therefore, contended by the prosecution that the two appellants intentionally caused grievous hurt to the deceased Fatabhai to kill him on the spot.

#. On account of the above incident, the informant filed the FIR before the police. The dead-body was sent to the hospital for post-mortem and the post-mortem note was obtained. Further investigation was undertaken. The panchnama was drawn in respect of the place of the offence. The muddamal weapons were attached. The

appellants were arrested. After the conclusion of the investigation, a chargesheet was filed. Since the offence punishable under section 302 was exclusively triable by the Court of Sessions, the case against the two appellants was committed to the court of Sessions.

#. There the learned Additional Sessions Judge verified that the police papers were supplied to the appellants. The charge as above was framed, read over and explained to the appellants. They pleaded not guilty to the said charge, and therefore, evidence was recorded.

#. At the conclusion of the evidence, the learned Additional Sessions Judge recorded further statement of the appellants under section 313 of the Code and heard the arguments advanced by the learned advocates for the parties. The appellants did not lead the defence. The appellants have pleaded that, they have not committed any offence and even if something is said to have been done by them, then they acted in exercise of their private defence, and therefore, no offence has been committed by any of the two appellants. That, therefore, they may be out right acquitted.

#. The learned Additional Sessions Judge did not accept the said defence and relied upon the evidence produced by the prosecution. But the learned Additional Sessions Judge found that the evidence was insufficient to hold the appellants guilty for the offence punishable under section 302 of IPC, and, therefore, the learned Additional Sessions Judge recorded the order of conviction for the offence punishable under section 304 Part II read with section 34 of IPC against the two appellants.

#. The learned Additional Sessions Judge after recording the aforesaid order of conviction, heard the appellants and the learned advocates for the parties on the quantum of punishment. Thereafter, the learned Additional Sessions Judge recorded the order of punishment punishing the two appellants to suffer RI for three years. Each of the appellants was also directed to pay a fine of Rs.250/-. In default of the payment of fine, each was directed to suffer further RI for three months. The muddamal articles were ordered to be destroyed.

#. Feeling aggrieved by the said judgment and conviction order of the learned Additional Sessions Judge, the appellants have preferred this appeal before this Court. It has been mainly contended that the learned Additional Sessions Judge has committed serious error in relying

upon the evidence of the prosecution. That the learned Additional Sessions Judge has committed error in convicting the appellants for the offence punishable under section 304, Part II of IPC. That the learned Additional Sessions Judge has not properly appreciated the position that the appellants were having right of private defence since the appellants were seriously attacked by the deceased and the informant and that they have sustained serious injuries and the injuries were also bleeding. That the learned Additional Sessions Judge has also not properly considered the fact that the injuries sustained by the appellants were not properly explained by the prosecution. That the whole judgment and conviction order of the learned Additional Sessions Judge are illegal and erroneous and deserve to be quashed and set aside. That, therefore, the present appeal be allowed, the judgment and order against the appellants be quashed and set aside and the appellants be acquitted out right for the offence for which they were charged.

##. On receiving the appeal, the same was admitted and the appellants were permitted to be continued on bail. Thereafter, the matter has come up for final hearing.

##. I have heard Mr.H.M.Parikh, learned advocate for the appellants and Mr.Bukhari, learned Additional Public Prosecutor for the respondent - State. Both of them has taken me through the evidence as well as the reasonings and findings recorded in the judgment of the learned Additional Sessions Judge.

##. Mr.H.M.Parikh, learned advocate for the appellants has strenuously argued that the incident has taken place right in the front of the shop of the appellants, and therefore, the learned Additional Sessions Judge has committed serious error in holding that the appellants were the persons who had started the incident.

##. It is not acceptable that simply because the incident has taken place in front of the shop of the appellants, the appellants cannot be treated to have started the incident. Here, it is to be considered that this is not the place of a private ownership. It is a public road leading to S.T.Bus Stand. The shop of the appellants has been located touching the said road. Many persons would be going and coming on the said road for going to and coming from the said bus stand. Therefore, place of offence from that angle is not very much important for the just decision in the case. Under the circumstances, it cannot be said that the appellants could not be treated to be the persons who had commenced

the incident simply because the offence has taken place near their shop.

##. Another aspect of the case is that the learned advocate for the appellants has argued that, there was no motive for the appellants to cause injuries to the deceased. Here, we find that the prosecution has made an attempt to prove the same even by producing one FIR dated 15.9.1985 lodged by Manguben wife of appellant Laxmanbhai before the police station against the deceased as well as against the informant - Rajubhai Fatabhai. There she has alleged that on the aforesaid date i.e. 15.9.1985 at about 11.30 a.m., deceased had met her on the way when she was carrying water pot on her head. That the deceased pulled her blouse resulting in some sort of injuries on her breast. That at that time, deceased had dhariya in his hand and he dealt dhariya blow on the head of the appellant - Laxmanbhai. That in the meantime, the informant came there running with a stick in his hand and he dealt stick blow on the head of the first appellant. That at the same time, Viththalbhai Somabhai had come there with an iron rod. That he dealt blow with the said iron rod on the right shoulder of the first appellant.

##. This shows that there was counter FIR filed by Manguben. The filing of the FIR cannot be doubted though it will be difficult to read the contents as proved in absence of the evidence of Manguben on record. It therefore cannot be said that there was no mention at all.

##. The learned advocate for the appellants has argued that the police has recorded this FIR without being lodged by Manguben. There is nothing on record to show that the police had fabricated the said FIR against the deceased and the informant. There appears to be no reason for the police to fabricate this FIR against the said persons. At the same time, contents of the FIR cannot be read as evidence since the informant of that FIR has not been examined before the trial Court and the FIR cannot be used as substantive evidence.

##. It is to be seen that when the incident took place, the deceased and the appellants were only three persons who were present on the spot at the commencement of the incident. Therefore, it would be difficult for the prosecution to say with certainty as to the cause of the incident. Since the deceased has passed away and the appellants are not bound to open their mouth before the court, whatever stated by them before police would be inadmissible.

##. The learned advocate for the appellants has strenuously argued that since the appellants were attacked and were injured by the deceased as well as by the informant, they may have caused some injuries to the deceased to defend themselves, and therefore, they were within their right to do so in exercise of the right of private defence.

##. Now it is to be seen that this aspect has been properly considered by the learned Additional Sessions Judge and because of this aspect, the learned Additional Sessions Judge has found the appellants guilty for the offence punishable under section 304 Part II of IPC and not for the major offence punishable under section 302 of IPC.

##. Another aspect of the argument of Mr.Parikh is that the appellants have sustained injuries and injuries were serious and on vital parts of the body of the appellants and they have not been properly explained by the eye witnesses, and therefore, the evidence of the eye witnesses should be discarded.

##. Even, this aspect has been properly considered and appreciated by the learned trial Judge and this is one of the grounds for not convicting the appellants for the offence punishable under section 302 of IPC.

##. There cannot be any dispute that the appellants sustained injuries but it is a fact that the appellants are proved to have started the incident. The informant received an information that the deceased was being beaten by the two appellants. He reached the spot and found that his father was being attacked and beaten by the two appellants. For this purpose, the informant has given oral testimony before the trial court at Exh.30. He has been cross examined at length, but the evidence has not been shaken to any extent and he has stood the test of the cross examination. Even with respect to the injuries sustained by the appellants, the witness has tried to explain the same by stating that he possessed a stick with him at the time of incident and the two appellants sustained injuries when he moved the said stick in defence. He has definitely stated that, before the appellants were injured, the deceased sustained injuries by means of dhariya and pipe blow at the hands of the appellants.

##. It is difficult to accept that the appellants after sustaining serious injuries could have dealt the dhariya

and pipe blow on the person of the deceased in such a way that the deceased died on account of the said injuries. This fact shows that, there was some fear in the mind of the appellants that they might get some injuries. The said fear was not such that they could kill the deceased. Therefore, the learned Additional Sessions Judge found that the appellants has exceeded the right of private defence.

##. The said evidence of the informant got corroboration from other material on record. We can gather from the record of the trial court that the panchnama with respect to the place of the offence has been recorded and the blood was found on the road at the place at which the incident is alleged to have taken place. The cloths were found stained with blood carrying `B' group. This fact can be gathered from the evidence of the report of the Chemical Analyser and Serologist.

##. The prosecution examined Manibhai Dhulabhai at Exh.23. He is a panch witness who has proved the contents of the panchnama at Exh.24.

##. The witness - Ambalal Mohanbhai Exh.25 is also a panch witness, but he has been treated hostile since he has not supported the case of the prosecution, that muddamal weapons were discovered under the panchnama Exh.26.

##. Ramabhai Aatabhai Exh.27 is a co-panch. He has also been treated hostile as he does not support the prosecution case.

##. Dr.Naishadhbhai Bhanubhai Bhatt Exh.31 is a Medical Officer who had noticed the injuries on the person of deceased Fatabhai on 15.9.1985. The injuries have been described in his evidence and his evidence is supported by his certificate at Exh.32. He has noticed the following injuries on the person of the deceased Fatabhai:

"(1) Incised wound above Lt eye brow 7 cm x
3cm stitch taken.

(2) C.L.W. above Lt Ear 4cm x 3cm Bleeding
++ swelling Lt
9 ++ of perital bone Advice for X-ray
Left hand palm 6x3cm.

(4) Incised wound on lt. knee joint 6x3cm.
inj.No.1x34 by sharp cutting instrument

and inj. 2x3 by hard and blunt substance."

##. The witness Ravjibhai Bhikhabhai Exh.34 was an eye witness of the incident, but he has not supported the prosecution case, and therefore, he has been treated hostile by the prosecution. He has simply said that, when he went to the spot, he found that the deceased was lying on the road and the appellants were also lying on the road. That all of them were injured and that injuries were bleeding. It is gathered that, he had stated to the police that he was witness to the incident and the appellants had dealt dhariya and iron pipe blow on the person of the deceased, and therefore, the deceased sustained serious injuries. However, he has not so stated before the court, and therefore, the said statement made by him to the police cannot be read in evidence.

##. Another witness Shankerbhai Bavabhai Exh.35 is also a hostile witness. He states that the incident was over when he reached the spot. He has denied that he had stated to the police that he had seen the appellants hitting the deceased with dhariya and iron pipe.

##. Dr.Bhadresh Kanubhai Patel Exh.36 is a Medical Officer who had examined the deceased and issued the injury certificate at Exh.36.

##. Witness Dr.Ravindra Balasaheb Deshmukhi Exh.40 had carried out the post martem of the dead body of the deceased on 30.9.1985. He has produced the post martem note at Exh.41. According to this witness, he had noticed the following external injuries on the person of the deceased :-

"(1) Healed stitch wound wound Lt site scalp in plain of sagital suter line about 5 cm above Lt ear 16 cmin length. (2) Healed stitched wound started from lateral and of Lt eye brow extending back ward posterly 3 cm. long (3) Healing infected abbrassion posterier aspect of Rt Arm 18x5 cm. peripheral portion pale yellow central portion covered with dark red swab & grienish yellow Lt slough. (4) infeted lacerafe would middle finger palnus. about 2 x 0.2 cm pasozzanil (5) interal would at left knee in the creaze of joint hole over patella marging regular & sharply cut 10x5 10x5 cm subcutenious tissue exposed. (6) Healing abbrassing Rt hip 3 x 2 cm

size."

##. According to the evidence of this witness, the cause of death is the head injury and its complication. It is therefore proved that the death is a homicidal death.

##. Witness Dr.Sudhir Manharlal Mehta Exh.43 had also given the evidence with respect to the injuries sustained by the deceased Fatabhai. He has produced the case papers also.

##. Then comes the evidence of Maniben Thomasbhai Exh.46. She was working as Police Head Constable in Memdavad Police Station. She has stated that one Manguben wife of the appellant - Laxmanbhai, had filed the FIR at 13.40 hours on 15.9.1985 against the deceased, informant and Viththalbhai Somabhai for which she had registered the offence. She has produced the said FIR at Exh.47. An attempt was made to show that the FIR was not written in accordance with the instructions of the informant Manguben and the same was prepared after 8.00 p.m. The witness has denied the same and her evidence goes to show that the FIR was filed at 13.40 hours. Even the FIR produced on record also supports the said testimony of the said Head Constable. However, since Manguben has not been examined, the contents of this FIR cannot be gone into.

##. Then comes the evidence of the Police Sub Inspector Shri Sharma at Exh.48 who had conducted the investigation in the case. He has produced the FIR at Exh.49.

##. Now the said FIR completely supports and corroborates the facts set out by the informant Rajubhai Fatabhai and the said evidence is further supported by the medical evidence also. The said fact is further supported by whatever materials available at the place of the offence.

##. Serious efforts were made by Mr.Parikh to argue that the appellants were within the right of private defence. It is to be noted that the deceased sustained grievous hurt by deadly weapon on his head. There was depressed fracture on the left paraital frental part on account of which injuries and damage were caused to the lower brain. This shows that serious injuries were caused to the deceased.

##. Then it is in the evidence that because of the injuries, leg of the deceased was seriously injured. Therefore, even the deceased could not have been in a

position to stand after receiving the injuries. Looking to the nature of the injuries sustained by the deceased and looking to the weapons used by the appellants and looking to the injuries sustained by the appellants, it is very clear that, it cannot be said that the appellants had absolute right to kill the deceased. The learned trial judge has considered this aspect properly and has found that the appellants had exceeded the right of private defence, and therefore, they were guilty of the offence punishable under section 304 Part II of IPC and not of the offence punishable under section 302 or even 304 part I of IPC.

##. The said finding and reasoning cannot be assailed on any ground, even on reappreciation of the evidence before the trial court. It is true that an independent witnesses have not supported the prosecution, but there appears to be general and common mentality amongst the neutral witnesses that they would not like to say something against some persons. When the said quarrel took place, in fact, eye witnesses were there and have been examined also. It, therefore, cannot be said that, eye witnesses and neutral witnesses have not been examined at all.

##. Another aspect of the case is that the learned advocate for the appellants has also argued that the informant - Rajubhai was serving in the factory, but his father was previously serving in police department, and therefore, police has tried to help the informant falsely. In fact, there were two witnesses cited as independent witnesses and they have also not supported the case of the prosecution. It appears that, the said two witnesses who have been treated hostile were formerly serving in police department. On the otherhand, even the appellant Laxmanbhai was also shown to have been serving in SRP. This shows that, police has not falsely and wrongly supported the case of the informant. Even, another witness Shankerbhai Bavabhai Exh.35 was also formerly working in police department. Therefore, two witnesses formerly working in police have not supported the case of the informant. It, therefore, cannot be said that the Investigating Officer has falsely supported the informant and the deceased and have created false case against the present appellants.

##. On going through the evidences and the judgment of the trial court, I am of the opinion that the learned Additional Sessions Judge has properly appreciated the factual aspects of the case. He has also properly considered and weighted the evidences on record. No

error has been committed by him for holding the appellants guilty for the offence punishable under section 304 Part II of IPC. There is no reason to differ from the view taken by the learned Additional Sessions Judge.

##. In the premises, it is not necessary to reiterate the grounds for confirming the finding and reasoning of the learned Additional Sessions Judge. It is well settled that when the appellate court is in general agreement with the finding and reasoning of the trial court, then it is not necessary to go into detailed discussion about reasoning and finding of the trial court. It is also not very much necessary to discuss the evidence on record in detail. Else it would amount to repetition of what has been stated in the judgment by the trial court. This can be had from State Vs. Mansukhlal Lavchand reported in 1993 (2) GLH, 849. However, Mr.Parikh has argued the matter at length in order to convince this court that the appellants had absolute right of private defence, and therefore, they have not committed any offence. Therefore, I have also discussed the evidence on record in a brief manner.

##. Again, I am of the view that, when the trial court has not recorded the conviction against the appellants for the offence punishable under section 302 of IPC considering the injuries sustained by the appellants also, there is no reason to take a view different from the view recorded by the trial court on this ground also.

##. Suffice it to say that, there is no merit in the present appeal. The finding and reasoning of the trial court are not challengeable and they are not even wrong or illegal. Therefore, they are required to be confirmed. In this view of the matter, the appeal fails and the same is required to be dismissed.

##. For the foregoing reasons, the appeal is ordered to be dismissed. The judgment and conviction order recorded by the learned Additional Sessions Judge are hereby confirmed. The appellants shall forthwith surrender. In case, they do not surrender within eight weeks from today, non-bailable warrant shall be issued against the appellants in order to see that they may serve the remaining sentence imposed upon them.

(D.P.Buch,J)
(pathan)